No. 6072.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
ZUSMAN FIERSTIEN
For a Writ of Habeas Corpus.

Zusman Fierstien,
Appellant,

vs.

Walter E. Carr, District Director of District No. 31, United States Immigration Service, at Los Angeles,
Appellee.

APPELLEE'S BRIEF.

SAMUEL W. MCNABB,
United States Attorney.

P. V. DAVIS,
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HARRY B. BLEE,
Immigration Service, on Brief.

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TOPICAL INDEX.

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APPELLEE'S BRIEF.

PRELIMINARY STATEMENT.

This case is before this court on appeal from an order of the United States District Court in and for the Southern District of California, Central Division, discharging a writ of habeas corpus and remanding Zusman Fierstien to the custody of appellee for deportation in accordance with the warrant issued by the Secretary of Labor. The original Department of Labor, Bureau of Immigration Record No. 55648/889 has been filed heretofore and when occasion arises said record will be referred to as the "Bureau File."

STATEMENT OF THE CASE.

Zusman Fierstien, appellant herein, is an alien, to-wit, a native and subject of Russia and of the Hebrew race. He last entered the United States on or about July 30, 1920, at Niagara Falls, New York, without inspection under the immigration law of the United States and apparently has continued to reside in the United States since that time. On or about the 15th day of October, 1928, appellant was arrested by the so-called "Radical Section" of the Los Angeles, California, Police Department, as an alien anarchist. The matter was reported to appellee, who directed an investigation. This investigation was instituted on the 18th day of October, 1928, at which time appellant was represented by counsel, and at the conclusion of the preliminary hearing accorded at that time, the facts were submitted to the Secretary of Labor at Washington, D. C., who caused his warrant to be issued directing that appellant be taken into custody and given a hearing to show cause why he should not be deported from the United States. Appellant was taken into custody under said warrant and pending further proceedings was released under bond and still is at liberty under bond. A hearing was accorded appellant on the 5th day of November, 1928, under the warrant, and on the 13th day of November, 1928, the hearing was reopened and further testimony was taken. At each of these November hearings, appellant was represented by counsel. At the conclusion of the hearing counsel submitted a brief which was transmitted to the Department of Labor with the complete record in the case and on the 21st day of February, 1929, the Secretary of Labor

issued his warrant directing deportation of appellant to Russia on the ground that he had

> "been found in the United States in violation of the Immigration Act of October 16, 1918, as amended by the Act of June 5, 1920, in that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating, or teaching the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States, or of any other organized government; that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays or causes to be written, circulated, distributed, printed, published or displayed or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching the unlawful damage, injury or destruction of property; and that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching sabotage."

QUESTIONS AT ISSUE.

1. Was there sufficient evidence in the record to justify the order of deportation?

2. Was the appellant accorded a fair hearing?

Appellee contends that both of these questions must be answered in the affirmative.

ARGUMENT.

As to the First Question.

Reference to the grounds of deportation as set forth in detail in our statement of the case indicates that the appellant herein is not charged with being an anarchist, nor with openly advocating the unlawful killing of officers of the Government, nor is he accused of personally teaching the unlawful destruction of property, nor is he accused of sabotage. The charge is that he is a member of or affiliated with an organization, association, society, or group that teaches and advocates these things. It is necessary for appellee to show some evidence of appellant's membership in or affiliation with some such organization.

It is well settled that the Communist Party of America is an organization that entertains a belief in the overthrow by force or violence of the Government of the United States and teaches the overthrow by force or violence of all forms of law. (*Skeffington v. Katzeff* (C. C. A. 1st), 277 Fed. 129; *Antolich v. Paul* (C. C. A. 7th), 283 Fed. 957; *Unger v. Seaman* (C. C. A. 8th), 4 Fed. (2d) 80; *Ex parte Jurgans,* 17 Fed. (2d) (D. C.) 507.) On page 8 of the hearing of appellant on October 18, 1928, as it appears in the bureau file, Lieutenant Hynes of the Los Angeles Police Department testified that appellant stated on October 15, 1928, that he, appellant, was a member of the Communist Party. On page 9 of the same hearing, the immigrant inspector asked this question: "Now, in view of all these facts and evidence do you still, I will ask you again if you are a member

of the Communist Party." Appellant answered this question as follows: "Yes, I am a member of the Communist Party," adding that he first joined the party in New York in October, 1928. In his brief, on page 5, counsel points out that at the time of the hearing the Communist Party was functioning under the name of the Worker's Communist Party and since then the name has been changed to the "Communist Party of U. S. A." He also points out that in the earlier years the party was known as the Communist Labor Party and still later was known as the Worker's Party. Appellee contends that the particular name under which the organization functions is immaterial for appellant admits that at the time he joined the organization he subscribed to the program and statutes of the Communist International. He is therefore a believer in the doctrines and teachings of the Third International and of the Communist Party, and in view of that fact appellant is a member of an organization which advocates those things prohibited by the act approved October 16, 1918 (40 Stat. 1012), as amended by the act approved June 5, 1920 (41 Stat. 1008). As such member, under the cases above cited, he is subject to deportation.

Appellee contends that there was substantial and sufficient evidence to justify the order of deportation. It is well settled that the courts will not review the finding of the Secretary of Labor upon questions of fact involved if there is some substantial evidence to support it.

Ng. Fung Ho v. White, 259 U. S. 246;
Wong Nung v. Carr, 30 Fed. (2d) 766.

As to the Second Question.

Appellee contends that the hearing accorded appellant was fair and that appellant was deprived of none of his constitutional rights. The hearing throughout was conducted in accordance with the immigration law and the rules and regulations based thereon. At the hearings appellant was represented by counsel. The right of cross-examination was accorded Appellant. He was permitted to introduce testimony in his own behalf. He was fully advised of his legal rights and at the conclusion of the hearing counsel submitted his brief in behalf of appellant.

The evidence being sufficient to justify the order of deportation and the hearing which developed that evidence having been fairly conducted, appellee respectfully contends that this appeal should be dismissed.

REPLY TO APPELLANT'S BRIEF.

Counsel attacks the legality of the proceeding which resulted in the order of deportation on the following five grounds, and they will be discussed in the order in which they appear.

1. Counsel Alleges Appellant Was Not Given a Fair Hearing Before the Immigration Service and the Department of Labor.

Counsel refers to *Ungar v. Seaman,* 4 Fed. (2d) 80, which upholds the right of an alien to a fair hearing in deportation proceedings and sets forth four elements which must exist before the hearing is fair. They are as follows:

a. A definite charge with opportunity for the alien to read same.

b. Right of counsel.

c. Right to cross-examine.

d. Only competent evidence to be used.

It is appellee's contention that in the case at bar all of the above requirements have been met.

Counsel refers to the use of the alternative "or" in the warrant of deportation and contends that the grounds for deportation are therefore not definite. We will discuss this feature later in this brief.

Under this subdivision counsel stresses the fact that appellant was denied the right to cross-examine Inspector Del Guercio, who conducted the hearing, as indicated by page 14 of transcript of hearing of November 5, 1928, as it appears in the bureau file. Reference to that file indicates that counsel had conducted a lengthy cross-examination of the Government's witness, Police Lieutenant Hynes, and that the question as to who had arrested appellant had been discussed at great length. During the cross-examination of Lieutenant Hynes and in the discussion that arose incident to such cross-examination, counsel turned to Inspector Del Guercio and stated to the inspector, "I want to ask you a question now." As far as the deportation proceeding is concerned the question as to who had originally taken appellant into custody is of slight importance, for the record shows that appellant, at the time of the hearing on November 5, 1928, was in the custody of the Immigration Service under departmental warrant of arrest dated October 20, 1929. The refusal of the examining inspector to give testimony on the question of appellant's arrest was immaterial to

the question at issue, which was the right of appellant to remain in the United States. The further charge that Inspector Del Guercio participated in the arrest of the alien and was present at, if he did not participate in "the seizure of the alien's possessions without a search warrant" is also believed by appellee immaterial when it appears that the exhibits seized were not considered by the Secretary of Labor when reaching his decision in the case, and when it further appears that the examining inspector did not in fact have anything to do with the seizure of the exhibits in question.

On page 10 of his brief, counsel alleges that the Board of Review claimed it had disregarded the exhibits in question, yet referred to it in support of its conclusion as to the nature of the Communist Party. We will refer in detail to this point elsewhere in this brief.

2. Counsel Alleges Evidence Was Used Against Appellant Which Had Been Taken From His Possessions Illegally.

On pages 1 and 2 of the report of the Board of Review under date of February 14, 1929, which report appears in the bureau file, will be found listed some 23 exhibits found by the police officers at the time appellant was taken into custody. It is the contention of appellee that the exhibits referred to did not come unlawfully into the possession of the Immigration Service. The police officer in this case made the arrest without a warrant upon a belief reasonably entertained by him that the appellant had committed a felony. As an incident of this arrest the police officer had the right to search, not only the person of the accused, but the room and immediate premises wherein he

was found. Such is the law not only of the state of California, but also of the United States.

Penal Code of California, Sec. 836 et seq.;
Agnello v. U. S., 269 U. S. 20;
Moron v. U. S., 275 U. S. 192.

But aside from the question of the legality of the seizure of the exhibits complained of it will be noted, by reference to the report of the Board of Review dated February 14, 1929, heretofore referred to, that the exhibits were discarded by the Board of Review and were not relied upon by it in reaching its decision. The reason for not considering the exhibits as evidence was because counsel objected throughout the hearing to their use because he claimed they were improperly in the possession of the Immigration Service. For the reasons above cited counsel is of the opinion that this second ground of objection is untenable.

3. Counsel Contends the Evidence Was Not Sufficient to Sustain the Charges Made and the Issuance of the Warrant of Deportation.

Appellant is a Communist and, as pointed out heretofore, he subscribed to the manifesto of the Communist International, thus declaring his adherence to the purposes and tactics of the Communist International and is bound by it. While the appellant denies that he believes in violence and states that any reformation and change should be brought about by educating the masses rather than by revolutionary tactics, yet the principles of the Communist Party and Communist International are well known and the high-sounding phrases and expressions used by

adherents to the policies of the Communist International cannot be relied upon entirely to indicate the true purpose of the organization. As set forth by Judge Geiger's quoted opinion on page 959 in the case of *Antolich v. Paul* decision, *supra:*

> "We are brought to a consideration, not as a mere matter of lexicolography of words used by the Communist Party and its adherents in their oral and written utterances, but rather to the understanding in the minds of those who receive them. . . ."

On page 3 of the report of February 14, 1921, submitted in the case by the Board of Review, which report is incorporated in the bureau file, the following appears:

> "the evidence is quite sufficient to show that, regardless of the name of the organization to which the alien belongs, and as shown by his receipt for membership, said organization is affiliated with the Communist Party, is governed by the orders or instructions of the Third International, and that party, while having candidates in the field in open and legal manner, has for its object the overthrow of the Government of the United States as it is now established, and the evidence is also sufficient to indicate that the party will not fail to use any means which may bring this about. . . . It is noted that the alien's attorney refers to the alien constantly as a Communist, and that the alien admits membership in the Worker's Communist Party of America and that his party must carry out the orders received from its superiors, the Third International of the Communist Party. While the alien refers to his own attitude as that of one who desires to proceed by orderly and legal means to obtain certain objectives, there is no showing that his party was organized for such a purpose, and in view of the fact that his party, under the direction of the Third International, does, and under orders must, advocate those things prohibited by the Immigration

> Act to an alien, and as the subject of these proceedings is an alien, *it is found that the charges are sustained.* . . . (Italics ours.)

Reference to the finding of the examining inspector as it appears on page 29, reopened hearing to show cause, dated November 13, 1928, incorporated in the bureau file, indicates that the examining inspector found five separate grounds upon which, in his opinion, a warrant of deportation should be based. Briefly stated, these grounds are that

1. Appellant is a member of an organization advocating the assaulting or killing of public officers.
2. That he is a member of an organization which advocates unlawful destruction of property.
3. That he is a member of an organization which advocates sabotage.
4. That he is a member of an organization which is opposed to all organized government.
5. That he is a member of an organization which teaches the overthrow by force or violence of the Government of the United States or of all forms of law.

As pointed out above, the Board of Review found that these charges were sustained. It appears, however, that in issuing the formal warrant of deportation the two charges last mentioned were not incorporated in said warrant. It is believed, however, that this should not justify cancellation of the proceedings. The Communist Party believes in and advocates the proscribed tactics covered by the five grounds for deportation included in the finding of the examining inspector. The Communist In-

ternational teaches those unlawful beliefs and practices. Appellee has subscribed to those principles and the mere fact that two of the grounds did not appear in the formal warrant of deportation should not, in the opinion of the appellee, justify cancellation of the warrant of deportation when it appears that appellant had notice of all five of said charges and was given opportunity to meet them.

4. Counsel Contends That the Findings Upon Which the Warrant of Deportation Was Based Are in the Alternative and Therefore No Findings at All.

Unquestionably it would have been better if the charge had not been stated in the alternative. The fact that the charge was so stated in appellee's opinion does not invalidate the proceeding. In *Kostenowczyk v. Nagle* (C. C. A. 9th), 18 Fed. (2) 834, as in the case at bar the warrant of deportation was stated in the alternative form following the length of the statute. This Honorable Court held with reference to that case:

> "Appellant has not been injured, for the warrant of arrest for deportation of an alien need not have the formality and particularity of an indictment, but is sufficient if it gives defendant adequate information of the act that brings him within the excluded classes and to enable him to offer testimony to refute the same at a hearing."

It appears in the case at bar, however, that there was no uncertainty on the part of counsel as to whether appellant was charged with being a member of a proscribed organization or whether he was charged with simply being affiliated with such organization. Reference to page 11 of

counsel's brief indicates their knowledge of the specific charge urged against appellant, for counsel says:

> "The court will observe that the warrant of deportation is based upon findings which boil down to this: that the alien is a member of an organization which advocates the unlawful assault or killing of any officers and which advocates the unlawful damage or injury or destruction of property, or which advocates sabotage."

Throughout the hearing the record shows that appellant was charged with being a member of a proscribed organization and counsel and appellant knew that was the charge. The fact that counsel made an attempt to show that the Worker's Communist Party, of which appellant was a *member*, was a legitimate political organization with presidential and vice-presidential nominees regularly appearing on the ballot in some 34 states of the Union, indicates that counsel and appellant were clear on this point and were not misled by the statement of the charge in the alternative.

5. Counsel Contends That the Record Before the Court Is Admittedly Incomplete, Since None of the Exhibits Received at the Hearing as Shown by the Record Is Included in the Record.

It is true that the exhibits in this case as listed on pages 1 and 2 of the finding of the Board of Review, dated February 14, 1929, were admitted in evidence by the examining inspector and were transmitted to the Secretary of Labor with the record in the case. The introduction of these various exhibits was objected to by counsel on the ground that they had been improperly secured. While not conceding that valid objection could have been inter-

posed against the use of these various exhibits, yet, because of the question on that point raised by counsel for petitioner, the Board of Review did not consider the exhibits in question as evidence and reached its decision on evidence aside from that contained in those exhibits. It is true that the Board of Review report refers to the exhibits as "inflammatory" in their nature, tending to stir up class hatred and such as may be expected to lead to the unlawful destruction or the assaulting of Government officers because of their official status. But the exhibits were nevertheless disregarded as evidence, as indicated by the board's finding of February 14, 1929, from which we quote.

> "It is found that the charges are sustained, regardless of the use, or failure to use, any of the documentary evidence to the introduction of which the alien and his attorney objected."

Counsel contends that although the exhibits were improperly admitted in evidence they were improperly discarded so that in the record which is now before the court was not preserved "the essentials on which the executive officers proceed to judgment." In this connection he refers to the cases of *Qwock Jan Fat v. White*, 253 U. S. 454, and *In re Can Pon*, 168 Fed. 479. In the Qwock Jan Fat case the report indicates that a Chinese person by that name was denied admission at San Francisco and that the record upon which the denial was made contained a report of an inspector embodied in which report was information given the inspector by an undisclosed witness. It appears that counsel for Kwock Jan Fat requested to see the testimony of the undisclosed witness and was informed that no affidavit or *verbatim* report of the testi-

mony given by the witness had been secured. The inspector's report which contained the information furnished by this undisclosed witness was made a part of the record and notation was entered in the record to the effect that the inspector's report had in no way influenced the action of the commissioner in denying Kwock Jan Fat admission to the United States. In reversing the Circuit Court of Appeals and ordering a writ of habeas corpus to issue, the Supreme Court of the United States held that it was within the province of courts in proceedings for review to prevent abuse of the extraordinary power conferred upon the Secretary of Labor and that in reviewing cases of the character mentioned, the court should have before it a full record upon which the executive officers based their findings. In the case of *In re Can Pon, supra*, the immigration authorities failed, through inadvertence or otherwise, to include in the record certain testimony taken on the hearing, which testimony had a bearing upon the question of Can Pon's citizenship. A portion of the omitted testimony contained direct evidence to the effect that Can Pon had been born in the United States and the court held that Can Pon was entitled to the benefits of such testimony and failure of the immigration authorities to include the testimony in question was a substantial denial of the rights of Can Pon.

In each of the above cases the omitted testimony unquestionably was favorable to the Chinese involved. In other words, the omitted testimony tended to show that they were entitled to admission to the United States. In the instant case the exhibits, if they had been considered in evidence by the Board of Review, might have militated

against appellant. We can conceive of no reason why counsel at the preliminary hearing and in the subsequent hearings should have objected so strenuously to the department considering these exhibits if anything therein contained might have benefited the appellant. The sole purpose for objecting to the introduction of the exhibits seems to have been on the theory that they had been improperly secured and that appellant would be injured thereby. While the Board of Review may not delete evidence from the record favorable to the alien, yet there seems no good reason why the board may not disregard testimony detrimental to the alien when it appears such testimony was improperly incorporated in the record by the examining inspector. In this connection we refer to the case of *Caranica v. Nagle*, decided by the Circuit Court of Appeals in this the 9th Circuit on January 9, 1928, and reported in 23 Fed. (2nd) 545. In that case the appellant's counsel did not cross-examine certain witnesses. Of its own motion the Board of Review postponed further hearing in the matter until the witnesses could be presented for cross-examination. On a subsequent hearing it was shown that the witnesses could not be found. Owing to the fact that the appellant had not been able to cross-examine the witnesses in question, the Board of Review in its recommendation said:

> "These persons were not presented for the purpose of cross-examination, and objection of counsel was therefore well taken, and the statements have not been considered."

By its decision the court held that the hearing was not unfair in view of the fact that the Board of Review on its own recommendation had not considered the testimony

previously given which was adverse to the alien's interest. This decision recognizes the right of the Board of Review to disregard testimony and evidence in certain instances, and appellee respectfully submits that the action of the board in the case at bar was in line with the principle enumerated in Caranica v. Nagle, and should not be considered justification for appellant's release under the writ.

Conclusion.

For the reasons above set forth appellee believes:

1. That there is sufficient evidence in the record to justify the deportation.

2. That the appellant was accorded a fair hearing.

Respectfully submitted,

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Assistant United States Attorney.

HARRY B. BLEE,
Immigration Service, on Brief.